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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

RANDALL GENE CUNNINGHAM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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29 pp

QUESTION PRESENTED

Whether the Oregon offense of second degree burglary is a "violent felony" under the sentence enhancement provision of 18 U.S.C. 924(e).

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v.

RANDALL GENE CUNNINGHAM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 878 F.2d 311; the opinion filed on denial of the petition for rehearing (App., *infra*, 7a-14a) is unreported. The opinion of the district court (App., *infra*, 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989. A petition for rehearing was de-

nied on November 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 922(g), provides in pertinent part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The 1986 version of 18 U.S.C. 924 (1982 & Supp. V 1987),[1] provides in pertinent part:

> * * * *
>
> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years * * *.

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[1] The 1986 version of Section 924 applies to respondent's offense. Congress has since amended 18 U.S.C. 924(e)(1) in a manner not material to this case. In the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402, Congress amended Section 924(e)(1) to provide that the enhanced sentence applies to otherwise qualified felons who have "three previous convictions * * * [for offenses] committed on occasions different from one another."

(2) As used in this subsection—

* * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

1. Respondent was indicted in the District of Oregon on one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). The indictment alleged that respondent had one previous conviction for second degree burglary under Oregon state law,[2] one previous state conviction for first degree burglary, and one previous conviction for second degree kidnapping, thus subjecting him to a minimum sentence of 15 years' imprisonment under 18 U.S.C. 924(e)(1) (Supp. V 1987). App., *infra*, 2a, 15a-16a.[3]

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[2] Oregon state law defines second degree burglary as follows:

> A person commits the crime of burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein.

Or. Rev. Stat. § 164.215(1) (1985).

[3] The government also filed a pretrial information, advising respondent that he was subject to an enhanced sentence under 18 U.S.C. 924(e)(1) (Supp. V 1987).

Respondent was convicted after a bench trial. Respondent then filed a motion opposing the government's request for an enhanced sentence. Respondent contended that his Oregon second degree burglary conviction was not a proper predicate offense under Section 924(e)(1) because that offense did not involve conduct that posed a serious potential risk of injury to others.[4] After a hearing, the district court rejected that argument, concluding that "Congress intended to include for the purposes of sentence enhancement consideration of all previous burglary convictions so long as they are felonies." App., *infra*, 17a. The court accordingly determined that "[t]he government is entitled to seek sentence enhancement in this case," *ibid.*, and later sentenced respondent to an enhanced term of 20 years' imprisonment under Section 924(e)(1). App., *infra*, 2a.

2. The court of appeals reversed and remanded for resentencing. App., *infra*, 1a-6a. The court followed the prior circuit precedent of *United States* v. *Chatman*, 869 F.2d 525, 527 (9th Cir. 1989), which held that the term "burglary" as defined in 18 U.S.C. 924(e)(2)(B)(ii) (Supp. V 1987) meant "common law burglary, i.e., 'the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein.'" App., *infra*, 3a (quoting *United States* v. *Headspeth*, 852 F.2d 753, 757 (4th Cir. 1988)). The court of appeals accord-

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[4] Respondent did not challenge the characterization of his remaining second-degree kidnapping and first-degree burglary convictions as "violent felonies." See 18 U.S.C. 924(e)(2)(B)(i) and (ii) (Supp. V 1987). Respondent is therefore subject to an enhanced sentence if his second-degree burglary conviction qualifies as a conviction for "burglary" within the meaning of Section 924(e)(2)(B)(ii).

ingly concluded that "[b]ecause [respondent's] Oregon state burglary conviction does not fit the definition of burglary * * * contained in section 924(e)(2)(B)(ii), it cannot serve as a basis for sentence enhancement." App., *infra*, 4a.[5]

Circuit Judge Skopil and District Judge McKibben, sitting by designation, filed a separate concurring opinion. App., *infra*, 4a-6a. Judges Skopil and McKibben stated that they "concur * * * only because [they] are bound by the holding in [*Chatman*]." *Id.* at 4a. In their view, "*Chatman* was wrongly decided." *Ibid.* They therefore wrote separately "to encourage en banc review of this case to correct the error." *Ibid.*

3. The government filed a petition for rehearing, together with a suggestion of rehearing en banc. On November 24, 1989, the court of appeals denied the petition. App., *infra*, 7a-8a. Judge O'Scannlain, joined by Judges Hall, Brunetti, Kozinski, Noonan, Thompson, and Trott, dissented from the denial of the suggestion of rehearing en banc. *Id.* at 8a-14a.

REASONS FOR GRANTING THE PETITION

In *Taylor* v. *United States*, No. 88-7194, this Court has granted certiorari to resolve the conflict among the circuits concerning the meaning of the term "burglary" under Section 924(e)(2)(B)(ii). In the decision below, the Ninth Circuit held that respondent's second degree burglary conviction was not covered under that statute. The court reasoned that be-

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[5] The court of appeals also concluded that respondent's Oregon conviction does not fall within the catch-all provision of Section 924(e)(2)(B)(ii) because that offense of second-degree burglary "does not necessarily require behavior causing a serious potential risk to others." App., *infra*, 3a-4a.

cause Congress failed to define the term "burglary" in the 1986 statute, that term must be construed to include only those crimes that would have been considered burglary at common law, *i.e.*, the breaking and entering of a dwelling at night with the intent to commit a felony within. The Fourth Circuit has adopted the same view. See, *e.g.*, *United States* v. *Headspeth*, 852 F.2d 753 (1988). On the other hand, the Fifth and Eighth Circuits have adopted a broader view, concluding that a prior state conviction is a conviction for "burglary" within the meaning of Section 924(e) if the State calls the offense burglary, but not otherwise. See, *e.g.*, *United States* v. *Leonard*, 868 F.2d 1393 (5th Cir. 1989), petition for cert. pending, No. 88-1885; *United States* v. *Taylor*, 864 F.2d 625 (8th Cir.), cert. granted, 110 S. Ct. 231 (1989).

The Third, Sixth, Seventh, Tenth, and Eleventh Circuits have taken a third view, holding that the modern, "generic" definition of burglary, which was contained in the predecessor to Section 924(e), the Armed Career Criminal Act of 1984, 18 U.S.C. App. 1202(c)(9) (Supp. II 1984), should be applied to prosecutions under the 1986 version of the statute. See, *e.g.*, *United States* v. *Palmer*, 871 F.2d 1202 (3d Cir.), cert. denied, 110 S. Ct. 223 (1989); *United States* v. *Taylor*, 882 F.2d 1018 (6th Cir. 1989), petition for cert. pending, No. 89-5962; *United States* v. *Dombrowski*, 877 F.2d 520 (7th Cir. 1989), petition for cert. pending, No. 89-5282; *United States* v. *Silkwood*, No. 88-2096 (10th Cir. Dec. 28, 1989); *United States* v. *Hill*, 863 F.2d 1575 (11th Cir. 1989).[6]

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[6] The First Circuit has declined to adopt any of those three constructions. See *United States* v. *Patterson*, 882 F.2d 595 (1989), petition for cert. pending, No. 89-5881. Having determined that it "frankly cannot divine how Congress in-

In our submission to the Court in *Taylor*,[7] we have explained that, in our view, the last of the three competing views is the correct one. Congress retained the generic definition of burglary that was contained in the predecessor Armed Career Criminal Act of 1984, a definition that reflects the prevailing modern view of the offense of burglary as defined in federal and state law. That interpretation is consistent with the language, legislative history, and purposes of the 1986 amendments to the Armed Career Criminal Act of 1984.

In this case, respondent's Oregon second-degree burglary conviction qualifies as a predicate crime, since that state offense, by definition, requires entering a building belonging to another for the purpose of committing a state or federal crime. See note 2, *supra*. Accordingly, the Ninth Circuit erred in remanding respondent's case for resentencing. Because the Court will be addressing in *Taylor* precisely the same issue that is presented in this case, this petition should be held for disposition in light of this Court's decision in that case.

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tended to define burglary" in the 1986 version of the Armed Career Criminal Act, the First Circuit refused to hold that a defendant's convictions for "breaking and entering" under Massachusetts law constituted "burglary" within the meaning of Section 924(e)(2)(B)(ii). Nonetheless, the court held that the defendant was subject to an enhanced sentence, because his conduct fell within the catch-all phrase of that section, which defines a "violent felony" to include any "conduct that presents a serious potential risk of physical injury to another." 882 F.2d at 604.

[7] See U.S. Br. at 11-37. We have provided a copy of our brief in *Taylor* to counsel for respondent in this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Taylor* v. *United States*, No. 88-7194.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-3046

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RANDALL GENE CUNNINGHAM,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Oregon

Argued and Submitted: May 5, 1989
Decided: June 27, 1989

Before: TANG and SKOPIL, Circuit Judges, and McKIBBEN, District Judge.*

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* The Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

TANG, Circuit Judge:

Randall Gene Cunningham (Cunningham) appeals the district court's use of his Oregon second-degree felony burglary conviction for statutory sentence enhancement under the Armed Career Criminal Act (the Act), 18 U.S.C. § 924. We reverse under the authority of *United States v. Chatman*, 869 F.2d 525 (9th Cir. 1989) and remand for resentencing.

FACTS AND PROCEEDINGS

Cunningham was indicted on one count of being a felon in illegal possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At the time of Cunningham's arraignment, the government filed an information alleging three prior violent felony convictions for purposes of sentence enhancement. Cunningham filed a motion to dismiss the indictment on the ground that 18 U.S.C. § 924(e) was unconstitutional, which the district court denied. Following a bench trial, the court found Cunningham guilty as charged.

After a sentencing hearing was scheduled, Cunningham filed a memorandum in opposition to sentence enhancement on the ground that his prior Oregon state conviction for second degree burglary should not be considered because the conviction does not qualify as a "violent felony" under section 924(e)(2)(B). The court held that the government was entitled to seek sentence enhancement based upon the prior conviction and sentenced Cunningham to 20 years[']imprisonment. He appeals.

DISCUSSION

Under the Act, an individual who transports a firearm in interstate commerce and has three previous convictions for a violent felony or a serious drug

offense, "shall be fined not more than $25,000 and imprisoned not less than fifteen years. . . ." 18 U.S.C. § 924(e)(1). The term "violent felony" is defined in the Act as

> any crime punishable by imprisonment for a term exceeding one year that . . . (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

We recently held in *United States v. Chatman*, 869 F.2d 525, 527 (9th Cir. 1989), that the term "burglary" as defined in 18 U.S.C. § 924(e)(2)(B) means common law burglary, i.e., "the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein." *See United States v. Headspeth*, 852 F.2d 753, 757 (4th Cir. 1988).

Here, one of Cunningham's previous three convictions is an Oregon state conviction for second degree burglary. Under Oregon law, a person commits burglary in the second degree if he or she enters or remains unlawfully in a building with the intent to commit a crime therein. Or. Rev. St. 164.215(1). This crime may be proved without proving such elements of common law burglary as nighttime entry or that the building entered is a dwelling. *See, e.g., State v. Eaton*, 43 Or. App. 469, 602 P.2d 1159 (1979) (unoccupied building is not a dwelling and thus entry cannot support first degree burglary conviction, only second degree burglary conviction). Moreover, second degree burglary does not necessarily require behavior causing a serious potential risk

to others. *Cf. Chatman*, 869 F.2d at 527 (possibility that theft from car may result in serious injury does not make all burglaries inherently dangerous crimes).

Because Cunningham's Oregon state conviction of second degree burglary does not fit the definition of burglary or violent crime contained in section 924 (e)(2)(B)(ii), it cannot serve as a basis for sentence enhancement. *See Chatman*, 869 F.2d at 527-28. Accordingly, we VACATE Cunningham's sentence and REMAND to the district court for RESENTENCING.

SKOPIL, Senior Circuit Judge, and McKIBBEN, District Judge, concurring:

We concur in Judge Tang's opinion only because we are bound by the holding in *United States v. Chatman*, 869 F.2d 525 (9th Cir. 1989). *See Landreth v. Commissioner*, 859 F.2d 643, 648 (9th Cir. 1988) (absent en banc review or an intervening Supreme Court decision, a three judge panel's decision is binding). We write separately to express our belief that *Chatman* was wrongly decided and to encourage en banc review of this case to correct the error.

Chatman holds that the term "burglary" in 18 U.S.C. § 924(e)(2)(B) should be interpreted under its common law definition to mean "the breaking and entering of the dwelling house of another, in the nighttime with the intent to commit a felony therein." *Chatman*, 869 F.2d at 527. As Judge O'Scannlain ably explains in his dissent in *Chatman*, the majority's holding precludes the use of a burglary conviction for enhancement purposes in every jurisdiction in the Ninth Circuit. That is true because none

of the jurisdictions within this circuit have retained the common law definition of burglary. Moreover, we have closed the door to a prosecutor's attempt to overcome *Chatman* by our rejection of individualized review of the underlying circumstances of a defendant's prior crime. *See United States v. Sherbondy*, 865 F.2d 996, 1009-10 (9th Cir. 1988) (adopting a categorical approach rather a fact-specific inquiry of the circumstances of the particular criminal occurrence). Thus, *Chatman*, in our view, improperly rewrites the law by eliminating the crime of burglary from the federal statute. *See California v. Tahoe Regional Plan Agency*, 766 F.2d 1308, 1314 (9th Cir. 1985) ("a statute should not be construed in a way that renders words or phrases superfluous").

One stated reason for the *Chatman* holding is that the panel sought to avoid "an unnecessary intercircuit conflict" with *United States v. Headspeth*, 852 F.2d 753 (4th Cir. 1988). In fact, however, a conflict already existed. Prior to *Chatman*, several circuits had held that burglary for purposes of the federal statute is to be defined by state law. *See United States v. Hill*, 863 F.2d 1575, 1581-82 (11th Cir. 1989) (rejecting the use of the common law definition of burglary and adopting state law definition); *United States v. Dickerson*, 857 F.2d 414, 419 (7th Cir. 1988) (applying state definition of burglary even if non-violent crimes are thereby included for purposes of sentence enhancement), *cert. denied*, —— U.S. ——, 109 S.Ct. 1753, 104 L.Ed.2d 189 (1989); *United States v. Portwood*, 857 F.2d 1221, 1223-24 (8th Cir. 1988) ("the statute says 'burglary' and we take that to mean 'burglary,' however, a state may choose to define it"). Moreover, subsequent to *Chatman*, all appellate courts have rejected application of

a common law definition of burglary for purposes of the Armed Career Criminal Act. *See United States v. Patterson*, 882 F.2d 595, 603 (1st Cir. 1989) (adopting generic definition of burglary); *United States v. Palmer*, 871 F.2d 1202, 1208 (3d Cir. 1989) ("We agree with the government that the term 'burglary must be given the generic definition. . . ."); *United States v. Leonard*, 868 F.2d 1393, 1399 (5th Cir. 1989) ("We conclude that a conviction for a crime which the state denominates 'burglary' is a conviction for burglary within the meaning of the [ACCA]."); *United States v. Taylor*, 864 F.2d 625, 626-27 (8th Cir. 1989) (applying state definition of burglary). Thus, *Chatman* managed to avoid only a conflict with the Fourth Circuit while aligning the Ninth Circuit against all other circuits to address the issue. We should reexamine our position.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-3046

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RANDALL GENE CUNNINGHAM, DEFENDANT-APPELLANT

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Filed: Nov. 24, 1989

Before: THOMAS TANG and OTTO R. SKOPIL, JR., Circuit Judges, and HOWARD D. MCKIBBEN, District Judge.*

ORDER

Pursuant to G.O. 5.4(c)(4)(A) the petition for rehearing and the suggestion for rehearing en banc has been presented to the full court which has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

* The Honorable Howard D. McKibben, United States District Judge for the District of Nevada, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

A dissent to the decision rejecting rehearing en banc authored by Judge O'Scannlain and joined by Judges Hall, Brunetti, Kozinski, Noonan, Thompson and Trott is filed herewith.

DISSENT

O'SCANNLAIN, Circuit Judge, with whom Circuit Judges HALL, BRUNETTI, KOZINSKI NOONAN, THOMPSON, and TROTT concur, dissenting from the order rejecting the suggestion for rehearing en banc

By rejecting the government's suggestion to rehear this case en banc, the court lets stand an unfortunate and utterly needless hindrance to effective law enforcement. Congress has stated clearly, as a matter of national policy, that armed career criminals are a threat to the very health of our modern society. Sentence enhancement is the precise antidote identified by the legislative branch to deal with the problem nationwide. Nationwide except, it now becomes, for the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, plus the territories of Guam and the Northern Mariana Islands. Nationwide, that is, except for about twenty percent of the population of this country and half its land mass. For this court now rules that burglary convictions in nine states and two territories can no longer be taken into account to enhance sentences under the Armed Career Criminal Act of 1984. Because this ruling offends common sense, is contrary to express congressional intent, and contravenes the overwhelming weight of authority from other circuits, I respectfully dissent.

I

Randall Cunningham was indicted on one count for possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Supp. V 1987). At the time of Cunningham's arraignment, the government filed an information alleging that he had three prior felony convictions for purposes of 18 U.S.C. § 924(e) (Supp. V 1987), which provides for enhanced sentences without parole where defendants, who are convicted under section 922(g)(1), have three or more previous convictions of a "violent felony." "Violent felony" is defined to include "burglary." 18 U.S.C. § 924(e)(2)(B)(ii).

One of Cunningham's three prior convictions was an Oregon conviction for second-degree burglary. Under Oregon law, a person commits burglary in the second degree if he "enters or remains unlawfully in a building with intent to commit a crime therein." Or. Rev. Stat. 164.215(1) (1985). Over Cunningham's objection that second-degree burglary under Oregon law is not a "violent felony," the district court imposed an enhanced sentence of twenty years[']imprisonment.

A panel of this court reversed the district court and held that the Oregon burglary could not be counted as one of the three predicate felonies. The panel was relying on this court's recent decision in *United States v. Chatman*, 869 F.2d 525 (9th Cir. 1989), which held that the term "burglary" as used in 18 U.S.C. § 924(e)(2)(B)(ii) means common law burglary—"the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein." *Id.* at 527. The *Cunningham* panel found that "[b]ecause [an] Oregon state conviction of second degree burglary does

not fit the definition of burglary . . . contained in section 924(2)(B)(ii) [sic], it cannot serve as a basis for sentence enhancement." *Cunningham*, No. 88-3046, slip op. 6973, 6976-77 (9th Cir. June 27, 1989). In other words, because a burglary might have occurred during the day in an office building, it cannot be counted.

Judges Skopil and McKibben specially concurred because they felt bound by *Chatman*. Both judges stated their belief that *Chatman* was wrongly decided, however, and they encouraged en banc review "to correct the error." *Cunningham*, No. 88-3046, slip op. at 6977.

II

Contrary to the court's decision in *Chatman*, now compounded by its decision in *Cunningham*, Congress never intended to limit the definition of "burglary" in 18 U.S.C. § 924(e) to common law burglary.[1] As

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[1] The majority in *Chatman* erred because it misread the legislative history of section 924(e), and placed determinative weight on the fact that one of the House bills, H.R. 4768, limited the definition of "violent felony" to crimes involving "the use, attempted use, or threatened use of physical force against the person of another." 869 F.2d at 527-28. *See also United States v. Headspeth*, 852 F.2d 753, 756-58 (4th Cir. 1988). Even under this definition of "violent felony," burglary surely must be included. Burglary is a crime that, by its nature, involves a substantial risk of physical force against the person of another.

The Fourth Circuit in *Headspeth*, in deciding that Maryland's "storehouse breaking" offense did not constitute "burglary" under section 924(e) as amended, limited "burglary" to its common law definition. At least *Headspeth*, unlike *Chatman*, has the merit of not rendering that part of the Armed Career Criminal Act a dead letter within its Circuit's boundaries. Two of the five states comprising the Fourth Cir-

originally conceived, the Armed Career Criminal Act of 1984 defined "burglary" in broad, generic terms as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. App. § 1202 (c)(9) (1982 & Supp. II 1984) (repealed). The legislative history reveals why the broad definition was chosen:

> Robberies and burglaries are the most damaging crimes to society. Robberies and burglaries occur with far greater frequency than other violent felonies, affect many more people, and cause the greatest losses. A person is forty times more likely to be a victim of robbery than of rape.
>
> * * * * *
>
> Burglaries involve invasion of [innocent individuals'] homes *or workplaces*, violation of their privacy, and loss of their most personal and valued possessions.
>
> * * * * *
>
> Most robberies and burglaries are committed by career criminals . . . [who] commit robberies and burglaries interchangeably.

H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (statement of Sen. Specter) (emphasis added).

The Career Criminal Amendments Act of 1986 eliminated the preexisting definition and provided no substitute. But the Amendment's legislative history

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cuit seem to retain in their "burglary" statutes all the elements of the common law crime. Indeed, they are the only two such states nationwide. *See Chatman*, 869 F.2d at 530 (O'Scannlain, J., dissenting).

shows that Congress intended to *broaden* rather than restrict the number of offenses which would give rise to sentence enhancement. Senator Arlen Specter, who introduced the original career criminal bill, understood that the amendment would serve to "broaden the definition [of career criminal] so that we may have a greater sweep and more effective use of this important statute." *Armed Career Criminal Act Amendments: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 44 (1986). To achieve this goal, the Bill "broaden[ed] the so-called predicate crimes to include drug violations and certain other serious violent acts." 132 Cong. Rec. 7697 (1986) (statement of Sen. Specter). Representative Ron Wyden, the sponsor of H.R. 4639 (a House bill which was a precursor of the amendment), explained that while the Act had been a success, it "would be much more effective if the predicate offenses were *extended beyond* robbery and burglary to include crimes of violence and serious drug offenses." *Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 6 (1986) (emphasis added).

Congress thus intended that burglary, as defined under the Armed Career Criminal Act of 1984, would continue to serve as a predicate offense. Moreover, Congress intended to *expand* the number and variety of offenses which would give rise to sentence enhancement under the Act. There is absolutely no indication that Congress sought to restrict the offenses giving rise to sentence enhancement. *See United States v. Hill*, 863 F.2d 1575, 1580 (11th Cir. 1989). This court's decision to introduce such a restriction

for the nine western states and two Pacific territories flies in the face of the will of Congress.

III

All circuit courts of appeals which have decided the issue since *Chatman* have held that the term "burglary" is not limited to its common law definition. Three circuits simply carry forward the express definition of "burglary" contained in the original version of section 924(e). *See Hill*, 863 F.2d at 1581-82;[2] *United States v. Dombrowski*, 877 F.2d 520, 530 (7th Cir. 1989); *United States v. Palmer*, 871 F.2d 1202, 1208 (3d Cir. 1989).

The other approach is the one I recommended in my dissent in *Chatman*—to treat section 924(e) as applicable to any felony defined as "burglary" under state law. *See Chatman*, 869 F.2d at 530-31 (O'Scannlain, J., dissenting). Both the Fifth and Eighth Circuits take this tack. *See United States v. Quintero*, 872 F.2d 107, 115 (5th Cir. 1989); *United States v. Taylor*, 864 F.2d 625, 626-27 (8th Cir. 1989), *cert. granted*, No. 88-7194 (Oct. 10, 1989).

Defendant Cunningham's Oregon second-degree burglary conviction would qualify as a predicate crime under either of the rationales adopted by these five courts.

IV

By refusing to take *Cunningham* en banc, this circuit reaffirms its commitment to a medieval anach-

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[2] A subsequent decision of the Eleventh Circuit applying this principle is awaiting certiorari consideration by the Supreme Court in a petition filed by the convicted defendant urging reversal based on, *inter alia*, our *Chatman* decision. *Carter v. United States*, 872 F.2d 434 (11th Cir. 1989), *petition for cert. filed*, No. 88-7307 (May 22, 1989).

ronism rejected by every state legislature in this circuit. Congress never intended ancient notions of common law pleading to control crime fighting in the twentieth century. Let us hope that the states of the Ninth Circuit do not become a haven for armed career criminals beyond the reach of the deliberate sentence enhancement policy set by Congress.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CR 87-252-FR

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDALL GENE CUNNINGHAM, DEFENDANT

[Filed Mar. 10, 1988]

OPINION AND ORDER

FRYE, Judge:

The matter before the court is the objection of defendant, Randall Gene Cunningham, to an enhancement of sentence sought by the government.

FACTS

Cunningham was convicted on February 2, 1988 of being a felon in possession of a firearm in violation of 18 U.S.C.A. § 922(a)(1). At trial, the government proved that Cunningham had previously been convicted of the felonies of 1) burglary in the first degree, 2) kidnapping in the second degree, and 3) burglary in the second degree. The penalty for being a felon in possession of a firearm is imprison-

ment for not more than five years, a fine of not more than $5,000, or both. 18 U.S.C.A. § 924(a)(1) (West Supp. 1987).

The government seeks an enhancement of sentence for Cunningham on his conviction of being a felon in possession of a firearm, arguing that Cunningham is a "person [violating] section 922(g) . . . and [having] three previous convictions . . . for a violent felony." 18 U.S.C.A. § 924(e)(1) (West Supp. 1987). If the sentence which could be imposed on Cunningham on his conviction of being a felon in possession of a firearm is enhanced, Cunningham could be fined up to $25,000 and sentenced to imprisonment for not less than fifteen years, without the possibility of probation or parole.

APPLICABLE STANDARD

"[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year that . . . (ii) is burglary . . . ." 18 U.S.C.A. § 924(e)(2)(B) (West Supp. 1987).

Cunningham argues that Congress intended to provide enhanced penalties only for those persons convicted of being a felon in possession of firearms who have been previously convicted of three violent crimes, and that since one of Cunningham's prior convictions is for burglary in the second degree, which is not a violent crime, his penalty cannot be enhanced.

RULING

In the State of Oregon, the crime of burglary in the second degree is not a crime of actual violence: "A person commits the crime of burglary in the second degree if the person enters or remains unlaw-

fully in a building with intent to commit a crime therein." O.R.S. 164.215(1). In the State of Oregon, burglary in the second degree is punishable by imprisonment for a term exceeding one year, O.R.S. 161.605(3), and is therefore a felony.

The court finds that Congress intended to include for the purposes of sentence enhancement consideration of all previous burglary convictions so long as they are felonies. The government is entitled to seek sentence enhancement in this case.

IT IS SO ORDERED.

DATED this 10th day of March, 1988.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

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ORIGINAL

No. 89-1101

Supreme Court, U.S.
FILED
FEB 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDALL GENE CUNNINGHAM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent accepts Petitioner's Statement of the question presented in this case.

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No. 89-1101

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDALL GENE CUNNINGHAM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Randall Gene Cunningham, through counsel, opposes the grant of a writ of certiorari as sought by the United States in its petition to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT

Respondent accepts as adequate the statement of the case contained in the Government's petition. Pet., 1-5.

REASONS FOR DENYING THE PETITION

I. The decision of the Ninth Circuit is a correct one.

The Circuit Courts of Appeal have reached conflicting conclusions with regard to the issue raised here. This is generally a basis for granting the writ sought, under Rule 10.1(a). But the approach taken by the Ninth Circuit is the correct one, and this court should adopt it in reversing the lower court decision in United States v. Taylor, 864 F.2d 625 (8th Cir., 1989) cert. granted, No. 88-7194. By extension, this Court should deny the relief sought by Petitioner herein.

In Taylor, the Government concedes that the compromise bill which eventually became the statute at issue in these cases, 18 USC Section 924(e), was ". . . drafted hastily at the end of the session" and as a result it omitted to define the term "burglary." Taylor, U.S. Br. at 27.

In the absence of statutory language, the Courts of Appeal have employed four separate and distinct interpretations of the statute, as accurately described in both the Government's brief in Taylor, supra, at 5-8, and in the Government's Petition in this case, Pet. at 5-7.

The Government further concedes that the States have given numerous definitions to the term "burglary" and those definitions are sufficiently at variance with each other that using them as the basis for a predicate definition under Section 924(e) ". . . could produce anomalous results and appears not to be what Congress had in mind." Taylor, U.S. Br. at 29. If this Court

agrees, reversal would appear to be the required result in Taylor, with resulting remand to the Eighth Circuit.

The Government argues that the predecessor Armed Career Criminal Act of 1984 contained a "generic definition of burglary," 18 U.S.C. App. Section 1202(c)(9) (repealed) that "reflects the prevailing modern view of the offense," even though, as noted, the modern statutes used by the States vary widely. Pet. at 7. The Government argues by extension that the predecessor definition carried over into the existing statute, notwithstanding the fact that it was deleted when the statute was amended.[1]

Against this historical background of varying and contradictory results, it seems clear that Congress has failed to define the term "burglary" as it is employed in the Armed Career Criminal Act. Congress may, indeed, have intended to define the term, and the Government invites this Court to speculate as to the precise definition Congress would have given the term had it thought to do so. This Court should, however, reject the

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[1] In its brief in Taylor, the Government discusses pending remedial legislation apparently intended to resolve the issue raised in this case. The pending legislation would define "burglary" as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a federal or state offense." U.S. Br. at 28. This definition resurrects Section 1202. It should be noted that "surreptitious" entry is not an element of the offense of second degree burglary under either the Oregon statute at issue here or the Missouri statute at issue in Taylor. The proposed remedial legislation would, in fact, apparently remove convictions such as Respondent's from the class of potential predicate crimes.

The ultimate question is not what Congress may have intended to do, but rather what it did. In this instance, Congress has failed to provide a uniform definition of "burglary." Where Congress has omitted to define a term, it is axiomatic that the courts should employ the term as it was used at common law. Accordingly, the decision of the Ninth Circuit in this matter was a correct one, and the Government's Petition for a Writ of Certiorari should be denied.

II. If Certiorari is Granted, this Court should allow Respondent to file a brief on the merits.

The Government apparently asserts that the issue raised in Taylor is identical to that raised in this case, and that Taylor is dispositive. Pet. at 8. Respondent disagrees.

Respondent contended below that on its face, the use of the term "burglary" in Section 924(e) appeared to mean "burglary" ". . . however a State chooses to define it." United States v. Portwood, 857 F.2d 1221, 1224 (8th Cir., 1988), cert. den., 109 S.Ct. 2073 (1989). Respondent argued that the statute was overbroad and violated equal protection, and the Government now apparently concedes that such an interpretation leads to anomalous results and is undesirable. Taylor, U.S. Br. at 29. Respondent urged the Court of Appeals to adopt the construction later adopted by the First Circuit in United States v. Patterson, 882 F.2d 595 (1st Cir., 1989). Under the Patterson rule, a "burglary" is a predicate offense if it also comports with the definition of "violent felony" contained in Section 924, but not

otherwise. 882 F.2d at 604. Because the Government concedes that employment of the "state-label" approach leads to anomalous results, the briefing in Taylor does not address the possibility that the "state-label" approach is a correct analysis of the statute, and that accordingly this Court should confront the constitutional questions of overbreadth and equal protection raised by respondent below.[3] If this Court grants the Government's Petition, this Court should order additional briefing as necessary to fully develop this issue.

CONCLUSION

The Government's Petition should be denied; if the Government's Petition is granted, this Court should order further briefing of issues not addressed in Taylor v. United States.

Respectfully submitted,

David K. Allen
Attorney for Respondent

[3] Petitioner in Taylor raises the issue, Br. Pet. at 26ff; the Government concedes that the approach is flawed without extensive discussion. U.S. Br. at 29ff.